# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

## No. 133.

ALBERT S. APSEY, RECEIVER OF THE FIRST NATIONAL BANK OF CHELSEA, PLAINTIFF IN ERROR,

vs.

ANNA G. WHITTEMORE.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

FILED JANUARY 14, 1909.

(21,474.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 23, 1910.

a UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the Honorable the Judges of the Superior Court of the Commonwealth of Massachusetts, holden at Boston, within and for the County of Suffolk, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Superior Court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between Albert S. Apsey, Receiver of the First National Bank of Chelsea, Plaintiff, and Anna G. Whittemore, Defendant, in a plea of contract wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Plaintiff as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the nineteenth day of December in the year of our Lord one thousand nine hundred and eight.

L. C. TUCKER,
*Deputy Clerk of the Circuit Court of the United States, District of Massachusetts.*

Allowed by

JOHN A. AIKEN,
*Chief Justice of the Superior Court.*

b COMMONWEALTH OF MASSACHUSETTS,
*Suffolk, ss:*

And now, here, the Judges of the Superior Court for the Commonwealth of Massachusetts, holden at Boston, within and for said County of Suffolk, make return of this writ by annexing hereto and sending herewith, under the seal of the said Superior Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In Testimony Whereof, I, Francis A. Campbell, Clerk of said Superior Court have hereto set my hand and the seal of said Court this thirty-first day of December, A. D. 1908.

[Seal the Superior Court.]

FRANCIS A. CAMPBELL, *Clerk.*

c *Exemplification of the Record.*

1 COMMONWEALTH OF MASSACHUSETTS,
*Suffolk, ss:*

To all persons to whom these presents shall come, Greeting:

Know ye that among our records of our Superior Court for the said County of Suffolk, it is thus contained, the following being the entire record in the case:

COMMONWEALTH OF MASSACHUSETTS,
*Suffolk, ss:*

To the Sheriffs of our Several Counties or their Deputies, Greeting:

[SEAL.]

We command you to attach the goods or estate of Anna G. Whittemore of Newton in our County of Middlesex, Defendant, to the value of Two Thousand Dollars, and to summon the said Defendant (if she may be found in your precinct) to appear before our Justices of our Superior Court to be holden at Boston, within and for our said County of Suffolk, on the first Monday of April next; then and there in our said Court to answer unto Albert S. Apsey, Receiver of the First National Bank of Chelsea, the said Receiver having
2 a usual place of business at Boston in our County of Suffolk. Plaintiff in an action of contract.

*Plaintiff's Declaration.*

The plaintiff says that he was, on the 25th day of August, 1906, duly appointed by the Comptroller of the Currency of the United States of America, Receiver of the First National Bank of Chelsea, a corporation organized under the banking laws of the United States, and having its usual place of business at Chelsea in the County of

Suffolk, and that immediately after said appointment, under the direction of said Comptroller, he took possession of the books, papers and assets of every description belonging to said bank, and still has the same in his possession, and has title in and to the same and all of the same.

And the plaintiff further says that the defendant was and is a stockholder in said bank, and held ten shares of its capital stock of the par value of $100. per share; that the Comptroller of the Currency of the United States, in pursuance of the authority vested in him by law, made an assessment upon the shareholders of said bank of one hundred per cent of the par value of the amount of stock held by them respectively, and the amount of the defendant's liability under said assessment was and is $1,000., and notice of said assessment and of said liability was sent to the defendant by the plaintiff on or about the twenty-fifth day of September, 1906, and the defendant has not paid the same.

3 Wherefore the defendant owes the plaintiff the amount of said assessment, with interest thereon from said twenty-fifth day of September, 1906.

By His Attorney, GEO. L. WILSON.

To the damage of the said Plaintiff (as he says) the sum of Two Thousand Dollars, which shall then and there be made to appear with other due damages. And have you there this writ with your doings therein.

Witness, John A. Aiken, Esquire, at Boston, the Fifth day of March in the year of our Lord one thousand nine hundred seven.

FRANCIS A. CAMPBELL, *Clerk.*

On which said writ return of service was made in the words following, to wit:—

MIDDLESEX, *ss:*

NEWTON, *March 5th*, 1907.

By virtue of this writ, I this day at three o'clock P. M. attached all the right, title and interest the within named Anna G. Whittemore has in and to any and all real estate in the County of Middlesex in the south district thereof and afterwards within three days, I deposited a certified copy of this writ with so much of my return endorsed thereon as relates to the foregoing attachment in the Registry of Deeds for said South District of Middlesex County. March 16th 1907 I gave in hand to said Whittemore a summons of this

4 writ fo her appearance to answer at Court as within directed.

SAM'L W. TUCKER,
*Deputy Sheriff.*

| | |
|---|---|
| Attachment | 1.00 |
| Copy | 1.00 |
| Pd. to record | 25 |
| Tr. " " | 56 |
| Service | 50 |
| Travel | 96 |
| | $4.27 |

On said first Monday of April, A. D. 1907, the Plaintiff, receiver as aforesaid, appeared by Geo. L. Wilson, Esquire, his attorney as aforesaid, and entered the above suit.

And thereafterwards, to wit:—on the eighth day of said April, 1907, the following appearance in writing was entered, to wit:—

SUFFOLK, *ss:*

Superior Court, —— Sitting, 190-.

ALBERT S. APSEY, Rec'v'r, Pl'ff,
v.
ANNA G. WHITTEMORE, D'f't.

In the above action I appear for defendant.

GEORGE H. MELLEN.

And on the twenty-second day of said April, 1907, said Defendant filed her answer in the words following, to wit:—

5 COMMONWEALTH OF MASSACHUSETTS.
*Suffolk, ss:*

Superior Court.

ALBERT S. APSEY, Rec'r,
vs.
ANNA G. WHITTEMORE.

*Defendant's Answer.*

And now comes the defendant in the above entitled action and for answer denies each and every material allegation in the plaintiff's writ and declaration contained.

And further answering the defendant especially denies that she is or ever was a stockholder in the "First National Bank of Chelsea," the banking association mentioned in the plaintiff's declaration, and the defendant denies that she now holds or ever held ten shares or any shares of the capital stock of said banking association; and the defendant denies that she owes the plaintiff the sum of one thousand dollars; and denies that she owes the plaintiff anything.

And further answering the defendant says that on September 5th, 1904 and for some time previous thereto she was the owner and holder of ten shares of the capital stock of the "First National Bank of Chelsea, Massachusetts" a banking association and corporation organized under the laws of the United States of America, whose charter expired on said 5th day of September, 1904, and the defendant says that a new banking association under a new charter was formed on or about September 6th, 1904, under the name of "First

National Bank of Chelsea," and said "First National Bank of
6 Chelsea" under and by the authority of its new charter and as a distinct and separate banking association, did a banking business subsequent to said September 5th, 1904, up to and including August 25th, 1906 upon which last named date said banking association and its assets were taken in charge by the Comptroller of the Currency, its officers were forbidden to carry on its business and the plaintiff was appointed receiver thereof. The defendant did not assent to the amendment of the Articles of Association providing for extension of said charter and the defendant did not consent to the extension of said charter and the defendant never became a stockholder in the banking association of which the plaintiff is receiver.

The defendant further says that desiring to withdraw from said banking association at the time of the expiration of its charter, that is on said September 5th, 1904, as required by the Statutes of the United States in such cases provided, within thirty days from the date of said certificate of approval of said amendment of said Articles of Association, she gave notice in writing to the directors of said banking association whose charter expired on September 5th, 1904, that she desired to withdraw from said banking association. The defendant did everything which the Statutes of the United States required of a dissenting stockholder of a National banking association and from *that* time the said banking association of which the plaintiff is receiver commenced doing business, that is, on or about said September 6th, 1904, the defendant ceased to be a stockholder in the association whose charter expired, and became and was
7 a creditor of the new banking association to the amount of the actual value of said ten shares of stock in the old association and was a creditor of the new banking association to said amount on said 25th day of August, 1906, when the plaintiff was appointed receiver as aforesaid, and the defendant is now a creditor of the banking association of which the plaintiff is the receiver and she is not a stockholder therein.

The defendant says that in accordance with section 5 of the Act of Congress approved July 12th, 1882, on or about November 1st, 1904, she appointed William R. Dresser of Brookline in the County of Norfolk in said Commonwealth, as a member of a committee of three persons which com-ittee should ascertain the value of the defendant's ten shares of stock in the banking association whose charter expired on said September 5th, 1904, said value to be ascertained by making an appraisal of the property which said banking association held on said September 5th, 1904, as provided by said Act of Congress, and the defendant duly notified said banking association of the appointment of said Dresser as aforesaid.

The said William R. Dresser duly accepted his appointment as a member of said committee and duly notified said banking association of his acceptance and said banking association on or about November 15th, 1904, appointed Sylvester B. Hinckley of Brookline aforesaid as its member of said committee and said Hinckley duly accepted his appointment as a member of said committee. At the

time of his appointment on said committee, said Hinckley
8 was a stockholder in said banking association, its president and a member of its Board of Directors.

The defendant further says that it became the duty of said Hinckley and Dresser within a reasonable time after their acceptance of their respective appointments on said committee as aforesaid, in accordance with the provisions of said Act of Congress, to meet and choose a third member of said committee of appraisal, and the defendant says that repeatedly during the years 1904 and 1905 she requested and demanded of said committee that they choose a third member thereof and proceed to appraise the value of said ten shares of stock so held by her as of September 5th, 1904, said Dresser was at all times ready and willing to proceed with his duties as such appraiser and endeavored to get the said Hinckley to act with him in choosing a third appraiser to ascertain the value of said ten shares of stock in said former banking association as of September 5th, 1904, when said charter expired. But said Hinckley always refused and neglected to act as such appraiser and refused to do anything toward appraising the value of said stock. The defendant alleges that said Hinckley was unwilling to have said stock appraised by any person outside of said banking association because of the fraudulent acts of said Hinckley in using the assets of said banking association and said Hinckley placed every possible obstruction in the way of an appraisal of the assets of said bank as of said September 5th, 1904. Said Hinckley by his refusal to allow said Dresser to act as an appraiser and by his refusal to choose a third appraiser
9 to act with them, the said Hinckley and Dresser, prevented an appraisal of said ten shares of stock and fraudulently deprived the defendant of the value of said stock as of said September 5th, 1904. By the fraudulent acts of said Hinckley as aforesaid and by his neglect and refusal to allow said shares of stock to be appraised, the defendant was prevented from obtaining the amount of the value of her said stock as of said September 5th, 1904. Said Hinckley continued to obstruct and prevent the appraisal of said ten shares of stock up to and including August 25th, 1906, the date of the appointment of the plaintiff as receiver of said banking association.

Since said receiver was appointed as aforesaid, both said Dresser and said Hinckley have died.

Since said September 5th, 1904, when said charter expired, the defendant has not received any income or dividends from said new banking association, has had none of the privileges of a stockholder in said new banking association and is in no sense a stockholder of the said present banking association and has not been a stockholder of said present banking association but on or about said September 6th, 1904, became a creditor of the banking association of which the plaintiff is receiver and has continued to be a creditor thereof up to the present time to the full value of said ten shares of stock on said September 5th, 1904, and was prevented from having her shares of stock in said former banking association appraised and the value thereof paid to her by reason of the fraudulent and negligent
10 acts of said Hinckley who was president of said banking association as aforesaid.

And the defendant says that she never became a stockholder of the banking association of which the plaintiff has been appointed receiver and that she ceased to be a stockholder of said banking association whose charter expired on said September 5th, 1904 on said last named date and that she is a creditor and not a stockholder of the banking association of which the plaintiff is receiver.

Wherefore she cannot be held liable to the Plaintiff for the assessment mentioned in the plaintiff's writ or any part thereof.

By Her Attorney, GEORGE H. MELLEN.

And said Defendant, on the day and year last aforesaid, also filed the following, to wit:—

11 SUFFOLK, *ss:*

Superior Court, —— Sitting, 1907.

ALBERT S. APSEY, Rec'v'r, Pl'ff.
v.
ANNA G. WHITTEMORE, D'f't.

In the above action I claim a trial by jury.

ANNA G. WHITTEMORE,
By Her Attorney, GEORGE H. MELLEN.

Thence the suit was continued from time to time unto the fourteenth day of January, 1908, when and where the parties appeared, as aforesaid, and the cause, after a full hearing, was submitted to a jury sworn to try the same, who returned the following verdict, by order of Court, to wit:—

SUFFOLK, *ss:*

The Superior Court, January Sitting, A. D. 1908.

ALBERT S. APSEY, Receiver, Pl'f.

ANNA G. WHITTEMORE, D'f't.

The Jury find for the Defendant.

MILTON E. MURRAY,
*Foreman of the Jury.*

12 Whereupon the case having been submitted to the Court, upon consideration thereof, the following report to the Supreme Judicial Court for the Commonwealth was filed, by the presiding Judge, for the consideration by said Court of the law in the same, to wit:—

COMMONWEALTH OF MASSACHUSETTS,
*Suffolk, ss:*

Superior Court.

ALBERT S. APSEY, Receiver,
v.
ANNA G. WHITTEMORE.

*Report to the Supreme Judicial Court.*

This is an action at law by a Receiver of a National Bank appointed by the Comptroller of the Currency, to recover an assessment of one hundred per cent. of the par value of ten (10) shares of stock in the Bank, which assessment was made by the Comptroller of the Currency under Section 5151 of the Revised Statutes of the United States.

The pleadings may be referred to.

The action was tried before a jury.

It appeared in evidence without dispute that the First National Bank of Chelsea was, prior to August 16, 1906, a banking association duly organized and existing under the provisions of the National
Bank Act and amendments, with a capital of $300,000, di-
13 vided into 3000 shares of the par value of $100, each; that on said August 16, 1906, the said Bank closed its doors and suspended business; that on August 25, 1906, the plaintiff was duly appointed by the Comptroller of the Currency Receiver of said Bank; that on September 25, 1906, the Comptroller of the Currency ordered an assessment of $100. per share on each share of stock in said Bank, payable by the stockholders, according to their respective holdings, on or before October 25, 1906, and ordered the plaintiff to collect and recover the same by proper proceedings; that the defendant received from said Receiver a copy of said order of assessment and a separate notice and demand for payment, all of which were in the following form:—

"No. 533.

*Assessment upon Stockholders.*

TREASURY DEPARTMENT,
OFFICE OF THE COMPTROLLER OF THE CURRENCY,
WASHINGTON, D. C., *September* 25, 1906.

In the Matter of The First National Bank of Chelsea, Massachusetts.

To all whom it may concern:

Whereas, Upon a proper accounting by the Receiver heretofore appointed to collect the assets of "The First National Bank of Chelsea," Massachusetts, and upon a valuation of the uncollected assets

remaining in his hands, it appears to my satisfaction that in order to pay the debts of such association it is necessary to enforce
14 the individual liability of the stockholders therefor to the extent hereinafter mentioned, as prescribed by Section- 5151 and 5234 of the Revised Statutes of the United States.

Now, therefore, by virtue of the authority vested in me by law, I do hereby make an assessment and requisition upon the shareholders of the said "The First National Bank of Chelsea," Massachusetts, for Three Hundred Thousand Dollars, to be paid by them ratably, on or before the Twenty-fifth Day of October, 1906 and I hereby make demand upon each and every one of them for One Hundred Dollars upon each and every share of the capital stock of said association held or owned by them, respectively, at the time of its failure and I hereby direct Albert S. Apsey, the Receiver heretofore appointed, to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders.

In witness whereof, I have hereto set my hand and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this Twenty-fifth Day of September, A. D. 1906.

[SEAL.] (Signed) WM. B. RIDGELY,
*Comptroller of the Currency.*"

15 "OFFICE OF THE RECEIVER OF THE
FIRST NATIONAL BANK OF CHELSEA, MASSACHUSETTS,
CHELSEA, MASS., *Sept.* 25, 1906.

You will please take notice, That the Comptroller of the Currency has levied an assessment upon the stockholders of The First National Bank of Chelsea, Mass., of One Hundred Dollars ($100.00) a share, payable at the office of the Receiver, on or before October 25, 1906. The Receiver is, however, authorized by the Comptroller to grant an extension, without interest, to shareholders who pay 25 per cent. of the assessment on or before that date, and who will give a written obligation, satisfactorily guaranteed, to pay 25 per cent. additional on or before November 25, 1906; 25 per cent. on or before December 25, 1906; and the remaining 25 per cent. on or before January 25, 1907.

You are therefore requested to pay the assessment on ten (10) Shares of Stock standing in your name, in accordance with the foregoing order and this notice, or suit will be commenced to enforce payment.

(Signed) ALBERT S. APSEY,
*Receiver First National Bank of Chelsea, Mass.*

To Anna G. Whittemore, Newton Highlands, Mass."

16 It further appeared to be undisputed that in January 1893, the defendant received a certificate for ten (10) shares of the capital stock of said Bank made out in her name, duly signed and sealed and being in the following form:—

Massachusetts.

The First National Bank of Chelsea.

(Number 1075.) (10 Shares.)

This Certifies, that Anna G. Whittemore, of Newton Highlands, Mass., is the proprietor of ten (10) shares of the Capital Stock of The First National Bank of Chelsea, transferable only on the Books of the Bank in person or by Attorney, on the surrender of this Certificate. "No transfer of the stock of this Association shall be made without the consent of the Board of Directors by any Stockholder who shall be liable to the Association either as principal debtor or otherwise."

Chelsea, January 10, 1893.

THOMAS MARTIN, *President.*

WALTER WHITTLESEY, *Cashier.*

Shares $100. each."

17 that she held such certificate from the date of its issuance down to and after the date of the suspension of the Bank, and that she had it in her possession and produced it at the trial.

It also appeared to be undisputed that the twenty year period of succession of said Bank under the provisions of the National Bank Act, expired on September 5, 1904, and that on or before said date proper proceedings were taken under the Act of July 12, 1882, (one of the amendments to the National Bank Act), to amend the articles of association so as to extend the period of succession for a period of twenty years from said September 5, 1904, and that said articles were so amended.

It also appeared to be undisputed that the defendant did not assent to said amendment, but that, acting in pursuance of the provisions of Section 5 of said Act of July 12, 1882, and within the time therein named, she gave to the Bank Directors due notice of her desire to withdraw from the association, and afterwards appointed one William R. Dresser as one member of the appraisal committee under said Section 5, and gave due notice of such appointment to the Directors of the Bank, and that said Directors appointed Sylvester B. Hinckley as a second member of said committee of appraisal, but that these two never appointed the third member and no appraisal was ever made.

It also appeared to be undisputed that the said Sylvester B. Hinckley was at said time a Director of said Bank, its President, and a large stockholder therein.

18 It further appeared to be undisputed that the defendant, after waiting some months subsequent to the appointment of said Dresser and Hinckley, during which time she made all reasonable efforts in good faith to have said third member appointed but without result, in September 1905, retained an attorney, who at once communicated with said Hinckley urging him to join in the appointment of such appointment, and that the said Hinckley or the Bank retained counsel, and that the two counsel conducted a correspond-

ence on the question of such appointment, which correspondence, however, failed to result in such appointment.

It further appeared to be undisputed that on January 1, 1905, at the time of declaring its regular semi-annual dividend, the Bank declared a regular dividend of three (3) per cent. to the defendant on her said ten (10) shares and sent her a dividend check therefor, which the defendant promptly returned, declaring that she was not a stockholder in the Bank and declining to accept or to use the check. Further regular dividends were declared to her by the Bank on July 1, 1905, January 1, 1906 and July 1, 1906, the latter being the last dividend declared by the Bank prior to the suspension.

None of the said last mentioned dividends were sent to or received by the defendant. The defendant was also credited on the Bank's Stock Ledger with said ten (10) shares. There was no evidence offered or introduced tending to show that the Bank ever refused the defendant or withheld from her any of the rights or privileges of a stockholder, but the defendant never used or asserted any of said rights or privileges of a stockholder after September 5, 1904.

19 The following extract from the Bank's By-Laws was introduced in evidence:

"SECTION 15. The Stock of this Bank shall be assignable only on the books of this Bank, subject to the restrictions and provisions of this Act; and a Transfer Book shall be kept in which all assignments and transfers of stock shall be made. No transfer of stock of this association shall be made without the consent of the Board of Directors by any Stockholder who shall be liable to the association either as principal debtor or otherwise; and certificates of stock shall contain upon them notice of this provision. Transfers of stock shall not be suspended preparatory to a declaration of dividends and except in cases of agreement to the contrary expressed in the assignments, dividends shall be paid to the stockholder in whose name the stock shall stand on the day on which the dividends are declared."

"SECTION 16. Certificates of stock signed by the President and Cashier may be issued to stockholders and the certificate shall state upon the face thereof that the stock is transferable only upon the books of the Bank; and when stock is transferred the certificates thereof shall be returned to the Bank and cancelled and new certificates issued."

The above is all the material evidence in the case.

At the conclusion of the evidence, counsel for both parties claimed that there was no issue of fact to be settled by the jury.

The plaintiff presented the following requests for rulings:

20 *Plaintiff's Request for Rulings.*

One. The stockholders liable under Section 5151 of the Revised Statutes of the United States for the debts of a failed National Bank are those who, at the time of suspension, appear to be such on the books of the Bank.

Two. In this case, the defendant appearing on the books of the Bank at the date of suspension to be the holder of ten (10) shares

of its stock, she is liable in respect of said ten (10) shares under Section 5151 of the Revised Statutes.

Three. The giving of notice of desire to withdraw from the Bank under Section 5 of the Act of July 12th, 1882, followed by the nomination on the part of the shareholder, and also on the part of the Bank's directors, of appraisers under said section, no third appraiser having been chosen and no appraisal ever having been made, does not operate to sever the stockholder's relations with the Bank so as to render her free from liability under Section 5151.

Four. In order to effect a completed severance of a shareholder's relations with the Bank under said Section 5 of said Act of July 12th, 1882, there must be a completed appraisal and a surrender of the shareholder's certificate of shares.

Five. In this case, the defendant having retained possession and control of her certificates down to the date of suspension, she thereby retained all the rights, privileges and benefits of a shareholder, and is liable as such under Section 5151 of the Revised Statutes.

21 Six. In this case, there is no evidence tending to prove that the defendant was ever refused by the Bank any of the rights, privileges and benefits lawfully appertaining to her ownership of her shares; but the evidence conclusively shows that the Bank always accorded her her full rights and privileges as the holder of such shares.

Seven. Upon the whole evidence the defendant was a shareholder of said ten (10) shares at the date of suspension of the Bank, and is, therefore, liable under Section 5151 of the Revised Statutes.

Eight. Upon the whole evidence the plaintiff is entitled to recover the full amount claimed by the declaration, with interest from September 25, 1906."

All of the above requests I refused, and directed a verdict for the defendant, and now report the case for consideration by the Supreme Judicial Court.

It is agreed that the Supreme Judicial Court shall have power, (if the agreement of parties can give the power), to draw all such inferences as a jury could draw from the above facts

If the above rulings and decisions are correct, the verdict is to stand.

If the Supreme Judicial Court is of the opinion that numbers seven and eight of the plaintiff's above requests should have been granted verdict to be entered for the plaintiff for the full amount of the claim.

22 Otherwise, such disposition is to be made of the case as the Supreme Judicial Court may determine.

JOHN H. HARDY,
*Justice Superior Court.*

Thence the suit was continued, to await the decision of said Court, unto the twenty-second day of May, 1908.

And now the parties appear, as aforesaid, and it is ordered by said Supreme Judicial Court for the Commonwealth, by its rescript, as follows, to wit:—

COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, May 21, 1908.

In the case of Albert S. Apsey, Rec. vs. Anna G. Whittemore pending in the Superior Court for the County of Suffolk.

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz.,—

Verdict to stand.

By the Court,

May 21, 1908.

C. H. COOPER, *Clerk.*

23 *Brief Statement of the Grounds and Reasons of the Decision.*

Within a fair & reasonable construction of the statute, the def't had withdrawn from the association for the extended period of succession & had ceased to be a stockholder at the time when the assessment was levied & is not liable therefor. There was no error in the manner in which the court dealt with the case.

See opinion.

And said rescript is entered in this Court, accordingly.

And thereafterwards, to wit:—on the eighth day of June, in said year, as of the first day of said June, 1908, the defendant comes and files the following motion, to wit:—

COMMONWEALTH OF MASSACHUSETTS.

*Suffolk, ss:*

Superior Court.

APSEY, Rec'r,
vs.
WHITTEMORE.

Now comes the defendant in the above entitled case and asks that the enclosed receipt for $9.00 for printing defendant's brief in said case be allowed as of June 1st, 1908 so that the amount of said bill may be taxed in defendant's costs.

By Her Attorney, GEORGE H. MELLEN.

Assented to

GEO. L. WILSON,
*Att'y for Pl'ff.*

Attached to which said motion is the following, to wit:—

24 Fine Stationery Printing.

Established 1830.

Tel., Main 266.

Alfred Mudge & Son, Inc.,
Frank D. Allen, Assignee,
Commercial and Law Printing,
24 Franklin Street, Boston, Mass.

Sold to Geo. H. Mellen, Mar. 4, 1908—

25 cop. *Aspey*, Receiver v. Whittemore 4 pp. and filing..... 9 00

Received payment Apr. 28, 1909.

FRANK D. ALLEN,
*Assignee Alfred Mudge & Son, Incorporated.*
THOMAS.

And the Court endorses the following upon said motion, to wit:—

"SUFFOLK, ss:

BOSTON, 8 *June*, 1908.

Allowed by the Court by consent.
Attest

H. E. BELLEW,
*Ass't Clerk.*"

25 It is therefore considered and ordered by the Court, on said first day of June, A. D. 1908, that said Anna G. Whittemore, Defendant as aforesaid, recover against said Albert S. Apsey, as he is Receiver of the First National Bank of Chelsea, Plaintiff as aforesaid, her costs of suit taxed at thirty-nine dollars and eighty cents.

All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof, we have caused the seal of our said Superior Court to be hereunto affixed.

Witness John A. Aiken, Esquire, Chief Justice of our said Superior Court, at Boston, in said County and Commonwealth, this thirty-first day of December, in the year of our Lord one thousand nine hundred and eight.

[Seal the Superior Court.]

FRANCIS A. CAMPBELL, *Clerk.*

26 *Docket Entries.*

41177. Albert S. Apsey, Receiver, *vs.* Anna G. Whittemore.

| Counsel for Plaintiff, | Date. | No. | | Counsel for Defendant, |
|---|---|---|---|---|
| George L. Wilson. | 1907. April 1 | | Entered, declaration filed. | George H. Mellen. |
| | April 22 | 1 | Answer. | |
| | April 22 | 2 | Defendant claims trial by jury. | |
| Trial List. | 1908. Jan. 14 | 3 | Verdict for Defendant, by order of Court Case to be reported. | Trustees. |
| J. October Special 1907. | Feb. 6 | 4 | Report to Supreme Judicial Court. | 1. |
| | May 22 | 5 | Rescript from Supreme Judicial Court. Verdict to stand. | 2. 3. 4. 5. |
| Action of Contract. | June 8 | 6 | Defendant's motion for allowance of bill for printing brief as of June 1, 1908, allowed by consent. | 6. |
| *Ad damnum* | June 1 | | Judgment for Defendant. Costs, $39.80. | Counsel for Trustees: |
| $2,000. | Dec. 19 | 7 | Assignment of Errors. | 1. |
| | Dec. 19 | 8 | Petition for Writ of Error. | 2. 3. 4. |
| | Dec. 19 | 9 | Writ of Error from Supreme Court of the United States received and copy placed on file. | 5. 6. |
| [Seal the Superior Court.] | Dec. 29 | 10 | Citation with return of service received and copy placed on file. | |
| | Dec. 31 | | Papers transmitted to the Supreme Court of the United States in accordance with Writ of Error. | |

Copy.
Attest: FRANCIS A. CAMPBELL, *Clerk.*

27 COMMONWEALTH OF MASSACHUSETTS:

I, John A. Aiken, Chief Justice of the Superior Court of the Commonwealth of Massachusetts,

Do Certify, that Francis A. Campbell, Esq., whose signature is affixed to the papers hereunto annexed, is Clerk of said Superior Court, within and for the County of Suffolk, and hath the keeping of the files, records, and proceedings of said Court, within and for said County; Also, of the late Court of Common Pleas, within and for said County, and of the late Superior Court of the County of Suffolk, aforesaid; that he is, by Law, the proper person to make out and to certify copies of the files, records, and proceedings of said several Courts; that full faith and credit are and ought to be given

to his acts and attestations done as aforesaid; and that his attestation to the papers hereunto annexed, being numbered 1 to 26 inclusive of the files, records, and proceedings of the said Superior Court for Suffolk County is in due form.

In Testimony Whereof, I have hereunto set my hand and caused the seal of said Court to be hereunto affixed, this thirty-first day of December in the year of our Lord one thousand nine hundred and eight.

[Seal the Superior Court.]

JOHN A. AIKEN,
*Chief Justice of the Superior Court.*

28 COMMONWEALTH OF MASSACHUSETTS,
*Suffolk, ss:*

I, Francis A. Campbell, Clerk of the Superior Court within and for said County of Suffolk, hereby certify that the Honorable John A. Aiken, by whom the foregoing certificate was made, and who has thereunto subscribed his name, was at the time of making thereof, and still is, Chief Justice of the Superior Court of said Commonwealth, duly commissioned and qualified; to all of whose acts as such full faith and credit are and ought to be given, as well in courts of judicature as elsewhere.

In witness whereof, I have hereto set my hand and affixed the seal of said Court, this thirty-first day of December in the year of our Lord one thousand nine hundred and eight.

[Seal the Superior Court.]

FRANCIS A. CAMPBELL, *Clerk.*

29 *Copy of Opinion of Supreme Judicial Court for the Commonwealth.*

30 COMMONWEALTH OF MASSACHUSETTS,

BOSTON, *December* 28, 1908.

I certify the annexed to be a true copy of the opinion of the Supreme Judicial Court in the case of Albert S. Apsey, receiver, vs. Anna G. Whittemore decided on the 21st day of May, 1908.

HENRY W. SWIFT,
*Reporter of Decisions.*

31 MORTON, *J.:*

On the sixteenth day of August, 1906, the First National Bank of Chelsea closed its doors and suspended business, and on the twenty-fifth day of the same month the plaintiff was duly appointed receiver by the comptroller of the currency. On September 25, 1906, the comptroller ordered an assessment on each share of stock of $100, payable on or before October 25, 1906, and ordered the plaintiff to collect the same by proper proceedings. This is an action by the

receiver to recover of the defendant the assessment upon ten shares of which she is alleged to have been the owner at the time when the assessment was levied. The presiding judge ordered a verdict for the defendant, and the case is here on exceptions by the plaintiff to the ruling thus made and to the refusal to give certain rulings that were requested. We think that the ruling was right.

The question is whether the defendant was a shareholder
32 when the assessment was levied. The facts are undisputed. The defendant became a shareholder in 1893. On September 5, 1904, the twenty year period of succession of the bank expired. Proper proceedings were taken under U. S. St. 1882, c. 290, and the articles of association were amended so that the period of succession was extended twenty years from that date. Section 5 of that act provides "That when any national banking association has amended its articles of association as provided in this act, and the comptroller has granted his certificate of approval, any shareholder not assenting to such amendment may give notice in writing to the directors, within thirty days from the date of the certificate of approval, of his desire to withdraw from said association, in which case he shall be entitled to receive from said banking association the value of the shares so held by him, to be ascertained by an appraisal made by a committee of three persons, one to be selected by such shareholder, one by the directors, and the third by the first two; and in case the value so fixed shall not be satisfactory to any such shareholder, he may appeal to the comptroller of the currency, who shall cause a reappraisal to be made, which shall be final and binding; * * * and the value so ascertained and determined shall be deemed to be a debt due, and be forthwith paid, to said shareholder from said bank; and the share so surrendered and appraised shall, after due notice, be sold at public sale, within thirty days after the final appraisal provided in this section." Within the thirty
33 days thus provided the defendant gave the directors due notice of her desire to withdraw from the association and afterwards appointed one William R. Dresser as a member of the appraisal committee, and gave due notice of such appointment to the directors, and the directors appointed as a member one Sylvester B. Hinckley, a director of the bank and its president and a large stockholder. After waiting some months subsequent to the appointment of said Dresser and Hinckley, during which she made all reasonable efforts to have a third member appointed, but without success, the defendant, in September, 1905, employed counsel who communicated with Hinckley urging such appointment. Hinckley or the bank also employed counsel, and a correspondence, which proved ineffectual, ensued between the two attorneys in regard to the appointment. In January, 1905, the bank declared a regular dividend of three per cent and sent the defendant a check for the dividend on ten shares. The defendant promptly returned the check declaring that she was not a shareholder, and she never used or asserted any rights or privileges as a shareholder after September 5, 1904, the time when the twenty year period of succession of the bank expired. Further dividends were declared by the bank before its suspension, but none

of them were sent to or received by the defendant. The defendant retained her certificate of stock and did not offer, so far as appears, to surrender it, and was credited on the bank's stock ledger with the ten shares. The certificate contained the provision, if that is material, that the shares were "transferable only on the books
34 of the bank in person or by attorney on surrender of this certificate." A by-law of the bank also contained the same provision.

We think that the defendant cannot and should not be held liable as a shareholder at the time when the assessment was levied. The statute provides a method, as it is reasonable that it should, in which a shareholder who does not assent to the extension of the period of succession may withdraw from the association and have the value of his shares determined and paid to him. By pursuing the method thus prescribed, the shareholder becomes a creditor of the association to the amount of the value of his shares as thus determined, and his rights and liabilities as a shareholder cease. In the present case the defendant gave due notice that she did not assent to the extension and of her desire to withdraw from the association, and selected one person to act as a member of committee of appraisal, of which she duly notified the association, and the directors selected a second member of the committee. Down to this point the requirements of the statute were strictly followed. A third member of the committee was not, however, appointed by the two thus selected, and in consequence thereof no appraisal was made and the defendant did not surrender her shares, as it is implied by the statute that the shareholder shall do upon their appraisal and the payment of the value so determined; and the plaintiff contends that by reason thereof the defendant remained liable as a shareholder to such assess-
35 ments as might be levied. But it appears from the undisputed facts, from which it is agreed that the court may draw such inferences as a jury could draw, that, for some months after the appointment of the two members of the committee, the defendant made in good faith all reasonable efforts to have the third member of the committee appointed, but without success, and finally employed counsel, whose labors were equally futile. From the fact that the bank suspended payment a little less than two years after the extension of the period of succession, it would not be an unwarrantable inference that Hinckley, the member of the committee selected by the directors, and who was also the president and a large stockholder, did not care to have such an investigation into the affairs of the bank as would have been necessary to appraise and determine the value of defendant's shares, and that the failure to appoint a third member of the committee was due to obstacles interposed by him to such appointment. But, however that may be, it is manifest that the defendant did all that could fairly or reasonably be required of her to secure the appointment of a third member of the committee and an appraisal of her shares. There is nothing to show that she did not act in so doing in entire good faith and honesty of purpose, or that she did not perform every duty which the statute required her to perform, to obtain an appraisal of her shares and payment of the

value so determined. The case is not one where a shareholder has permitted his name to remain in outstanding certificates of
36 stock and on the stock ledger of the bank as a shareholder, and has thereby become estopped as between himself and the creditors of the bank to deny that he is a shareholder. But it is a case where the defendant withdrew and never became a shareholder for the extended period of succession, and has continued constant in her assertion that she was not and is not a shareholder. She has not tacitly or otherwise done or assented to anything inconsistent with that position. The fact that she did not surrender or offer to surrender her certificate of stock is immaterial. She was not required to surrender it except upon payment of the appraised value. Neither is it material that the bank continued to credit her with the shares on its stock ledger. It could not by so doing make her a shareholder in an association of which she had refused and continued to refuse to remain a member, and from which she had used every means in her power to make her withdrawal effectual. Otherwise by crediting her with the stock on its books, the bank could constitute her a shareholder as to its creditors even after her stock had been surrendered. The general rule in this country, differing in that regard from the rule in England (National Bank v. Case, 99 U. S. 628), is that one who allows stock to stand in his name on the books of a banking association is liable for assessments so long as he permits the stock to stand in his name on the books, and that he will not be relieved from liability, notwithstanding he may have made an out and out transfer to another person, unless the stock has been trans-
37 ferred on the books of the bank. Matteson v. Dent, 176 U. S. 521, 530, and cases cited. In the present case, as already observed, the defendant did not allow or permit the stock to stand on the books in her name, but did everything that she could to have the shares appraised in order that she might surrender them and receive payment therefor. The general rule is moreover subject to an exception where a shareholder has transferred his stock and it is accompanied by an adequate power of attorney to make the transfer, and the certificate and the power of Attorney have been delivered to the officers of the bank for the purpose of having the transfer made, but the bank officers have failed to make the transfer. In such a case it is held that the party in whose name the stock stands on the books has ceased to be a shareholder. Earle v. Carson, 188 U. S. 42. Whitney v. Butler, 118 U. S. 655. It seems to us that the case before us is more analagous to the cases last cited than to those in which a shareholder, who permitted his name to remain on the books as a shareholder after he had transferred his shares, has been held liable. It may be that the defendant could by proper proceedings have compelled the appointment of a third member of the committee and an appraisal of her shares, but we do not think that she can be held liable as a shareholder for not having done so. Whether she would have ceased to be a shareholder if all that she had done had been to send to the directors notice of her desire to withdraw and of her refusal to assent to the extension of the period of succession and nothing more, it is not necessary to consider. She,

in fact, did much more than that. Indeed, it is difficult to
38 see what more she could have done than she did to sever all relations with the association as a shareholder for the extended period of succession. She might, it is true, have surrendered and sacrificed her stock, but she was not required to do so. To construe the statute as requiring her to do so would be offering a premium for obstructive tactics on the part of the officers of the bank when a shareholder gives notice that he does not assent to the extended period of succession and desires to withdraw and to have his shares appraised and to be paid therefor, upon their surrender, the amount so determined. We are of opinion that within a fair and reasonable construction of the statute the defendant had withdrawn from the association for the extended period of succession and had ceased to be a shareholder at the time when the assessment was levied, and is not liable therefor. We see no error in the manner in which the presiding judge dealt with the case.

Verdict to stand.

39 [Endorsed:] Albert S. Apsey, Receiver, vs. Anna G. Whittemore. Certified copy of the opinion of the Supreme Judicial Court.

40 *Copy of Petition for Writ of Error.*

41 COMMONWEALTH OF MASSACHUSETTS.
*Suffolk, ss:*

Superior Court.

No. 41177.

ALBERT S. APSEY, Receiver,
v.
ANNA G. WHITTEMORE.

To the Honorable the Justices of the Superior Court:

Now comes Albert S. Apsey, Receiver, plaintiff in error, and says that he is a Receiver of a national bank, duly appointed by the Comptroller of the Currency of the United States of America, and is prosecuting these proceedings in error by direction of said Comptroller of the Currency, and petitions this Honorable Court to allow a writ of error to remove to the Supreme Court of the United States, for a review and correction thereof, the record in the case lately pending in said Superior Court, wherein the above-named plaintiff in error was plaintiff and the above-named defendant in error was defendant, and particularly the record of the judgment rendered by the Supreme Judicial Court of Massachusetts in the said case on May 21st, 1908, wherein the said Supreme Judicial Court of Massachusetts affirmed the judgment of the Superior Court of Suffolk County within said Commonwealth of Massachusetts directing a verdict for

the defendant in error; and your petitioner prays that he may be allowed to perfect these proceedings in error without giving a bond, and that all further procedings in said case be suspended and stayed until the determination of said writ of error by this Honor-
42 able Court.

Your petitioner respectfully states that he has this day filed herewith his assignment of errors committed by the said Superior Court in the said cause and intended to be urged by your petitioner and plaintiff in error in the prosecution of this, his suit in error.

Dated Dec. 15, 1908.

GEO. L. WILSON,
*Attorney for Plaintiff in Error.*

Copy,
Attest:

FRANCIS A. CAMPBELL, *Clerk.*

43 [Endorsed:] 8. No. 41177. Suffolk Superior Court. Albert S. Apsey, Receiver, v. Anna G. Whittemore. Petition for writ of error. Filed Dec. 19, 1908. Copy. Geo. L. Wilson, Attorney at Law, Easton Bldg., 15 State St., Boston, Mass. A. S. N.

44 *Copy of Assignment of Errors.*

45 COMMONWEALTH OF MASSACHUSETTS,
*Suffolk, ss:*

Superior Court.

No. 41177.

ALBERT S. APSEY, Receiver,
v.
ANNA G. WHITTEMORE.

*Assignment of Errors.*

The Superior Court erred as follows:

1. In refusing to rule, as requested by the plaintiff in error, that "The stockholders liable under Section 5151 of the Revised Statutes of the United States for the debts of a failed National Bank are those who, at the time of suspension, appear to be such on the books of the bank."

2. In refusing to rule, as requested by the plaintiff in error, that "In this case, the defendant appearing on the books of the bank, at the date of suspension, to be the holder of ten (10) shares of its stock, she is liable, in respect of said ten (10) shares, under Section 5151 of the Revised Statutes."

3. In refusing to rule, as requested by the plaintiff in error, that "The giving of notice of desire to withdraw from the bank, under Section 5 of the Act of July 12th, 1882, followed by the nomination

on the part of the shareholder, and also on the part of the bank's directors, of appraisers under said section, no third appraiser having been chosen, and no appraisal ever having been made, does
46 not operate to sever the stockholder's relations with the bank, so as to render her free from liability under Section 5151.'

4. In refusing to rule, as requested by the plaintiff in error, that "In order to effect a completed severance of a shareholder's relations with the bank, under said Section 5 of said Act of July 12th, 1882, there must be a completed appraisal and a surrender of the shareholder's certificate of shares."

5. In refusing to rule, as requested by the plaintiff in error, that "In this case, the defendant having retained possession and control of her certificates down to the date of suspension, she thereby retained all the rights, privileges and benefits of a shareholder, and is liable as such under Section 5151 of the Revised Statutes."

6. In refusing to rule, as requested by the plaintiff in error, that "In this case, there is no evidence tending to prove that the defendant was ever refused by the bank any of the rights, privileges and benefits lawfully appertaining to her ownership of her shares; but the evidence conclusively shows that the bank always accorded her her full rights and privileges as the holder of such shares."

7. In refusing to rule, as requested by the plaintiff in error, that "Upon the whole evidence the defendant was a shareholder of said ten (10) shares at the date of suspension of the bank, and is, therefore, liable under Section 5151 of the Revised Statutes."

8. In refusing to rule, as requested by the plaintiff in error, that "Upon the whole evidence the plaintiff is entitled to recover the full amount claimed by the declaration, with interest from Sep-
47 tember 25, 1906."

9. In directing a verdict for the defendant on all the evidence in the case.

Dated Dec. 15, 1908.

GEO. L. WILSON,
*Attorney for Plaintiff in Error.*

Copy,
Attest:

FRANCIS A. CAMPBELL, *Clerk.*

48 [Endorsed:] 7. No. 41177. Suffolk Superior Court. Albert S. Apsey, Receiver, v. Anna G. Whittemore. Assignment of Errors. Filed, Dec. 19, 1908. Copy. Geo. L. Wilson, Attorney at Law, Easton Bldg., 15 State St., Boston, Mass.

49 *Original Citation.*

(With Return of Service.)

50 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Anna G. Whittemore of Newton in the County of Middlesex within the District of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the city of Washington within thirty days from the date hereof pursuant to a Writ of Error filed in the Clerk's Office of the† Superior Court of the Commonwealth of Massachusetts at Boston in and for the County of Suffolk wherein Albert S. Apsey, Receiver of the First National Bank of Chelsea, Plaintiff, is the plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John A. Aiken, Chief Justice of the Superior Court of the Commonwealth of Massachusetts this Nineteenth day of December, in the year of our Lord one thousand nine hundred and eight.

[Seal of the Superior Court.]

JOHN A. AIKEN,
*Chief Justice of the Superior Court.*

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*Not exceeding 30 days from the day of signing.
†Name of Court to which Writ of Error is directed.

51 UNITED STATES OF AMERICA,
*District of Massachusetts,*
*County of Middlesex, ss:*

NEWTON, *December 24th*, 1908.

I hereby certify that on the twenty-fourth day of December, 1908, I served the within citation by giving in hand to the within named Anna G. Whittemore an attested copy thereof for her appearance to show cause at Court as within directed.

| | |
|---|---|
| Service | 50 |
| Copy | 1.00 |
| Tr. | 1.60 |
| | $3.10 |

SAMUEL W. TUCKER,
*Deputy Sheriff for said County of Middlesex.*

52 COMMONWEALTH OF MASSACHUSETTS,
*Suffolk, ss:*

Superior Court.

I, Francis A. Campbell, Clerk of the Superior Court, within and for the County of Suffolk, do hereby certify that the papers hereunto annexed are an exemplification of the record in the case of Albert S. Apsey, Receiver, vs. Anna G. Whittemore in said Superior Court determined, and attached thereto and transmitted with said Record is the original writ of error with return thereon together with an attested copy of the opinion of the Supreme Judicial Court for the Commonwealth, an attested copy of the petition for Writ of Error, an attested copy of the assignment of errors, and the original citation with return of service thereon.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at Boston, this thirty-first day of December, in the year of our Lord one thousand nine hundred and eight.

[Seal of the Superior Court.]

FRANCIS A. CAMPBELL, *Clerk.*

Endorsed on cover: File No. 21,474. Massachusetts Superior Court. Term No. 133. Albert S. Apsey, Receiver of the First National Bank of Chelsea, plaintiff in error, vs. Anna G. Whittemore. Filed January 14th, 1909. File No. 21,474.

# Supreme Court of the United States.

No. 133.

ALBERT S. APSEY, Receiver of the First National Bank of Chelsea,
PLAINTIFF IN ERROR,

v.

ANNA G. WHITTEMORE,
DEFENDANT IN ERROR.

## Brief for Plaintiff in Error.

### History of the Action.

This action at law was brought in the Superior Court for the county of Suffolk, a state court of Massachusetts, to recover an assessment levied on the defendant in error as a stockholder in a national bank under section 5151 of the United States Revised Statutes. The action was tried to a jury in the Superior Court. At the conclusion of the evidence counsel agreed that there were no issues of fact to be submitted to the jury (p. 11 of Record). Counsel for plaintiff in error submitted requests for rulings (see pages 11 and 12 of Record), all of which the presiding justice refused, and directed a verdict for the defendant in error (p. 12 of Record) and reported the case to the Supreme Judicial Court of Massachusetts (the report appears on pages 8 to 12, inclusive, of the Record).

The Supreme Judicial Court of Massachusetts, after full argument, handed down an opinion (pp. 16–20, inclusive, of Record) affirming the judgment of the Superior Court.

The plaintiff in error brings the case to this Court by writ of error on assignments of error set forth on pages 21 and 22 of the record.

**Statement of the Case.**

The First National Bank of Chelsea was, down to August 16, 1906, a banking association duly organized and existing under the provisions of the National Bank Act and amendments, with a capital of $300,000, divided into hundred dollar shares. On August 16, 1906, the bank failed, and on August 25, 1906, the plaintiff was duly appointed, by the Comptroller of the Currency, receiver of said bank. On September 25, 1906, the Comptroller, acting in pursuance of the power given him in that regard by section 5234 of the Revised Statutes of the United States (part of the National Bank Act), ordered an assessment of $100 per share on each share of the capital stock, to be paid by the stockholders, according to their respective holdings, on or before October 25, 1906, and directed the plaintiff to collect and recover the same by proper proceedings. This assessment was for the purpose of enforcing the stockholders' liability provided by section 5151 of the Revised Statutes of the United States (part of the National Bank Act).

A copy of the order of assessment appears on pages 8 and 9 of the record, and recites that the assessment was made after proper accounting by the receiver and a valuation of the uncollected assets, and a determination by the Comptroller that the assessment was necessary in order to pay the debts of the bank.

The defendant, on January 10, 1893, became the owner of ten shares of the capital stock of said bank, and on said

date received a certificate for ten shares in the form appearing on page 10 of the record. This certificate she held from the date of issuance, as above specified, down to and after the date of the suspension of the bank, and she had it in her possession and produced it at the trial. She received from the plaintiff a copy of said order of assessment and a separate notice thereof and demand for payment of the assessment on her ten shares of stock, and a copy of said last-mentioned notice and demand appears at page 9 of the record.

This suit is brought to recover said assessment.

Mrs. Whittemore's defense rested upon the following facts: On September 5, 1904, about twenty-two months prior to the failure of the bank, the twenty-year period of succession of the bank, under the provisions of the National Bank Act, expired. Prior to said September 5, by proper proceedings taken under the Act of July 12, 1882 (one of the amendments to the National Bank Act), the Articles of Association were amended so as to extend the period of succession for another term of twenty years from said September 5, 1904. The defendant was a non-assenting stockholder, and under the provisions of section 5 of said Act of July 12, 1882, she gave timely and proper notice to the bank directors that she desired to withdraw from the bank. She afterwards appointed a member of the committee of appraisal provided for in said section 5; and the directors of the bank appointed a member; but the two so appointed never appointed the third member, and no appraisal was ever made. The member appointed by the directors of the bank was a director and president and a large stockholder in the bank. In September of 1905 the defendant retained counsel, who endeavored to get the two

members to agree upon a third, so as to fill the appraisal committee, but without success.

The defendant's contention was that, having given notice of her desire to withdraw from the association, and not having thereafter accepted any dividends upon her stock, or used or asserted any of her rights or privileges as a stockholder, she was not lawfully a stockholder upon whom an assessment could be made under section 5151, though she retained her certificate and remained the record owner of the shares on the books of the bank.

The only further facts to be noted are that, at each regular semiannual-dividend day subsequent to the receipt of the defendant's notice of desire to withdraw, the bank declared to her a regular dividend on her shares. The check for the first of said dividends was sent to her, but she returned it, declaring that she was not a stockholder; and dividend checks for the subsequent dividends were issued, but not sent to her. There was, however, no evidence offered or introduced tending to show that the bank ever refused the defendant, or withheld from her, any of her rights or privileges as a stockholder, and she appeared on the bank's books as the holder and owner of said ten shares.

By-laws of the bank were put in evidence, providing that the bank's stock was assignable only on the books of the bank, and that dividends should be paid to the stockholder in whose name the stock should stand on the day of the declaration of the dividends; and also providing that, when stock was transferred, the certificates were to be returned to the bank and canceled, and new certificates issued. (See page 11 of the Record.)

No evidence was introduced tending to show any fraud or fraudulent acts on the part of Hinckley, one of the

appraisers, or that the said Hinckley prevented the making of the appraisal contemplated by the statute, as alleged in the defendant's answer (p. 6 of the Record).

**Argument.**

The Act of July 12, 1882, under one section of which the defendant's sole defense to the action arises, was an Act of Congress passed in amendment of various phases of the National Bank Act as it then stood; but the only portions of that Act having any bearing on this case are the first five sections.

Section 1 provides, in substance, that any national banking association may, at any time within two years next previous to the date of expiration of its period of succession, extend said period of succession for an additional twenty years, by amending its articles of association; and that thereupon it shall have succession for the extended period, unless sooner dissolved by its shareholders, or unless it shall forfeit its franchise by violation of law.

Section 2 provides, in substance, that such amendment to the articles of association must be authorized by the written consent of the holders of not less than two thirds of the capital stock, and that, after such consent, the same shall be certified to the Comptroller, with an application for approval of the amendment; and the Comptroller must issue a certificate before the amendment shall be valid.

Section 3 throws upon the Comptroller the duty, upon receipt of the certificate of consent and the application for approval of the amendment, to have a special examination of the bank made, at its expense, and if upon such examination he finds the association to be in satisfactory condition, he gives a certificate of approval; otherwise he withholds it.

Section 4. "That any association so extending the period of its succession *shall continue to enjoy all the rights and privileges and immunities granted, and shall continue to be subject to all the duties, liabilities, and restrictions imposed, by the Revised Statutes of the United States and other acts having reference to national banking associations, and it shall continue to be in all respects the identical association it was before the extension of its period of succession.*" Then follows a proviso not material to this action, relating to jurisdiction of suits by or against the bank.

Section 5. "That when any national banking association has amended its articles of association as provided in this act, and the Comptroller has granted his certificate of approval, any shareholder not assenting to such amendment may give notice in writing to the directors, within thirty days from the date of the certificate of approval, of his desire to withdraw from said association, in which case he shall be entitled to receive from said banking association the value of the shares so held by him, to be ascertained by an appraisal made by a committee of three persons, one to be selected by such shareholder, one by the directors, and the third by the first two; and in case the value so fixed shall not be satisfactory to any such shareholder, he may appeal to the Comptroller of the Currency, who shall cause a reappraisal to be made, which shall be final and binding; and if said reappraisal shall exceed the value fixed by said committee, the bank shall pay the expenses of said reappraisal, and otherwise the appellant shall pay said expenses; *and the value so ascertained and determined shall be deemed to be a debt due, and be forthwith paid, to said shareholder from said bank; and the shares so surrendered and appraised shall, after due notice, be*

*sold at public sale, within 30 days after the final appraisal provided in this section.*" Then follows a proviso not material to this action.

The defendant's contention arises solely under the above-quoted section 5. She says that, not having assented to the amendment, and having given timely notice of her desire to withdraw, she thereupon became, and thereafter remained at all times, a creditor of the association instead of a stockholder, and became entitled to receive from the association the then value of her shares; and that the facts that no appraisal was ever made, and that she never surrendered her certificates, and that she at all times held and retained said certificates down to the time of suit, are immaterial, because, she says, the statute, from and after the date of her notice of desire to withdraw, gave her the status of a creditor.

If this contention is correct, then it is lawfully possible for stockholders in a national bank to reduce the aggregate of its capital stock below the amount fixed by its articles of association, and for which it has always stood in the eye and mind of the public, by simply performing certain voluntary acts in their own behalf, while at the same time retaining in their possession their certificates, which are, to quote the language of the Supreme Court of the United States in *Pacific National Bank* v. *Eaton*, 141 U.S. 227, at page 234, "authentic evidence of title to stock," and while also they appear and remain on the books of the bank as the owners of the shares in question.

It is submitted that this contention would lead to the most absurd result, if sustained. It would mean that, regarded for the purposes of assessment under section 5151 of the Revised Statutes, a bank's total capital stock can lawfully

be less in amount than it openly appears to be, while at the same time certificates remain outstanding for the whole value of such apparent total — certificates which could be enforced against the bank while a going concern, if not by the notice-giving shareholder, at least by transferees who might purchase the same from such shareholder in good faith and for value.

So far as we have been able to ascertain, section 5 of the Act of July 12, 1882, has never been judicially construed outside this case excepting in the case of *Apsey* v. *Kimball*, decided in the Circuit Court of Appeals for the First Circuit upon the same facts that appear here, saving that there was another defendant and the number of shares was different.

In the present case the Supreme Judicial Court of Massachusetts (199 Mass. 65) was of opinion that Mrs. Whittemore was not a stockholder upon whom an assessment could be levied under section 5151, the Court saying that the case was analogous to *Earle* v. *Carson*, 188 U.S. 42, and *Whitney* v. *Butler*, 118 U.S. 655, and the conclusion being, in the language of the Court, "that within a fair and reasonable construction of the Statute, the defendant had withdrawn from the association for the extended period of succession, and had ceased to be a stockholder at the time when the assessment was levied, and is not liable therefor."

With all due respect to the Supreme Judicial Court of Massachusetts, the reasoning employed by it seems to be open to the criticism that, in addition to directly misconstruing the provisions of section 5 of the Act of July 12, 1882, it failed to give due weight to three important factors; namely, first, that the bank's character and identity were not changed in the least by the extension of its

period of succession (see Act of July 12, 1882, sec. 4), but that, on the contrary, it continued to be in all respects the identical association it was before the extension; secondly, that Mrs. Whittemore retained her certificates, and, through them, the full title to her shares, at all times after she gave her notice of withdrawal down to the time of trial, and that she remained at all times the open and unprejudiced owner of the shares on the books of the bank; and thirdly, and perhaps most important of all, that the suit was not brought to determine the rights of herself and the bank as against each other while the bank was a going concern, but, on the contrary, was to enforce the rights of creditors against Mrs. Whittemore as the record owner of shares, and the actual holder of certificates of shares after the bank had suspended and an assessment had been made under section 5151.

That Court, in its effort to give a general construction to the meaning of section 5, said at page 68,—

> "The Statute provides a method, as it is reasonable that it should, by which a stockholder who does not assent to the extension of the period of succession may withdraw from the association and have the value of his shares determined and paid to him. *By pursuing the method thus presented, the stockholder becomes a creditor of the association to the amount of the value of his shares as thus determined, and his rights and liabilities as a stockholder cease.*"

It is submitted that this construction is superficial. The section in question provides that the stockholder may give his notice, "in which case he shall be entitled to receive" from the bank "the value of the shares . . . to be ascer-

tained by an appraisal" by a committee selected as provided in the section.

Then follow provisions for an appeal by the shareholder to the Comptroller, and a reappraisal, "which shall be final and binding."

Down to the point of final and binding appraisal it seems plain that the stockholder has not become a creditor. The section, in general terms, entitles him to receive the value of his shares, *as finally fixed by the appraisers or by the Comptroller upon appeal and reappraisal*, but that is not the same thing as saying that he becomes irrevocably a creditor so soon as he has started in to pursue the method outlined in the section. There is no guaranty that he may not change his mind after giving his notice and appointing his appraiser. Down to the time when the final and conclusive appraisal has been made and declared, and the value for all time fixed, the shareholder in question occupies an executory position, so far as his general rights are concerned. And it is only when the value of the shares has been finally ascertained and determined,—when the appraisal proceedings have reached the stage of final judgment,—and when the stockholder has surrendered his certificates, that he changes into a creditor entitled to immediate payment from the bank. The section goes on to provide that the shares so surrendered and appraised shall be publicly sold after notice, within thirty days after final appraisal; evidently so that no reduction of capital should result from the operation of the section.

In the interim between the giving of the notice of withdrawal and the final appraisal the stockholder's status is not changed unless he has surrendered and given up his certificates, and probably not even then. He may still,

for aught that appears either directly or by implication from the section, take his dividends and sit in meetings, or sell his stock, or withdraw his notice, or what not. The whole gamut of rights, privileges, and benefits is open to him. And when the final appraisal has been made and the value determined, he must surrender, or offer to surrender, his shares as a condition precedent to getting his money. But he cannot blow hot and blow cold. If, while giving his notice and appointing his appraiser, he holds on to his certificates, knowing also that he remains on the books of the bank as the owner of the shares represented by them, and thereby keeps himself in the position to take his dividends if he chooses, or vote at stockholders' meetings if he wants to, or sell and transfer his stock to any one in the world who will pay value for it, he must be regarded as still a shareholder, so far as concerns the rights of creditors under section 5151. Having so kept that status, with the untrammeled right of transferring it to others and giving such others good title to it as against the bank, he cannot at the same time claim that he is a creditor instead of a stockholder, when he finds that the bank has gone down instead of up.

Supposing, for argument's sake, that the bank in question had, on August 16, 1906 (the day of failure), instead of closing its doors, found itself able to announce an extra dividend of $100 per share out of profits earned through some great stroke of fortune, but entirely earned subsequent to the date when Kimball gave his notice of withdrawal. Is it possible to say that the giving of his notice had shut him out from participation in those extra profits, while he still retained his certificates and appeared on the bank's books as the owner of the forty shares, and had been awarded regular dividends upon them in the

interim? There seems to be only one possible answer to that question, and that is that Kimball would undoubtedly be a stockholder, entitled to the extra profits.

For these reasons it is confidently submitted that the Supreme Judicial Court of Massachusetts has failed to give a satisfactory construction of the section in question, especially in the light of other commanding provisions of the National Bank Act and decisions thereunder, to which we now proceed to refer.

The section in question, and the Act of which it is a part, are but formal and perfunctory amendments of the National Bank Act, and they should be so construed as to keep them in harmony with the rest of the Act, as consistent subordinate parts of a great organic whole. No interpretation can satisfy the rational mind if it ignores this paramount rule of statutory construction. To so interpret amendments as to do violence to the character and functions of the main structural provisions of the original Act is shortsighted and mischievous. Even though the sum of money involved is trivial, and though one's natural sympathies run in favor of the pursued, it is nevertheless of prime value and importance, in a case of new impression, to stick to the law.

Section 5151 of the Revised Statutes, which is part of the National Bank Act, is one of the most important and familiar elements of the scheme of the National Bank Act. It provides that the shareholders of a national bank shall be individually responsible, equally and ratably, and not one for the other, for all its contracts, debts, and engagements, to the extent of the amount of the par value of their stock therein, in addition to the amount invested in the shares. This provision is enforced after suspension by the

receiver under the direction of the Comptroller, and express power for that purpose is given the Comptroller and the receiver by section 5234 of the Revised Statutes (also part of the National Bank Act).

This section 5151 has been said by the Supreme Court of the United States, in *Richmond* v. *Irons*, 121 U.S. 27, pp. 55, 56, to be an "essential element of the contract by which the stockholders become members of the corporation. . . . Its obligation becomes a part of every contract, debt and engagement of the Bank itself, as much so as if they were made directly by the stockholder instead of by the corporation."

This construction has been uniformly adhered to by the Supreme Court of the United States, and in *Stuart* v. *Hayden*, 169 U.S. 2, at page 8, the same Court said that the safety of a national bank, "so far as its creditors are concerned, depends largely upon the security given by the statutory provision entitling creditors to look to the individual liability of shareholders. . . ."

The section therefore imposes upon shareholders a contractual liability, just the same as if they had individually entered into the contract in express terms; and that liability has been imposed, not for the safety or security of the bank as a going concern, but of its creditors in case it should fail to pay its debts. They are the persons benefited, and to be benefited, by the section in question, and only very rarely and in exceptional cases have stockholders — meaning record stockholders on the books of the bank — been able to escape the enforcement of the contractual liability so imposed upon them for the safety of creditors.

Another part or element of the National Bank Act which should be borne in mind when construing section 5 of the Act of July 12, 1882, is section 5210 of the Revised Statutes, which throws upon the president and cashier of each bank the imperative duty of keeping at all times at its place of business a full and correct list of the names and residences, and the number of shares held by each shareholder, such list to be daily open to inspection of all shareholders and creditors of the bank and all state taxation officers.

Construing this provision, the Supreme Court of the United States said in *Pauley* v. *Trust Co.*, 165 U.S. 606, pp. 621, 622, —

> "*Manifestly, one, if not the principal, object of this requirement, was to give creditors of the association, as well as State authorities, information as to the shareholders upon whom, if the association becomes insolvent, will rest the individual liability for its contracts, debts and engagements.*
>
> "It is true that one who does not in fact invest his money in such shares, but who, although receiving them simply as collateral security for debts and obligations, holds himself out in the books of the association as the true owner, may be treated as the owner and therefore liable to assessment, when the association becomes insolvent and goes into the hands of a Receiver. But *this is upon the ground that by allowing his name to appear upon the stock list as owner he represents that he is such owner, and he will not be permitted, after the Bank fails and when an assessment is made, to assume any other position as against creditors. If, as between creditors and the person assessed, the latter is not held bound by*

*that representation, the list of stockholders required to be kept for the inspection of creditors and others would lose most of its value."*

Another part or element of the National Bank Act, without which a proper construction of section 5 of the Act of July 12, 1882, cannot be made, is section 5139 of the Revised Statutes, which provides that the capital stock shall be transferable only on the books of the association, though the method of transfer may be regulated by the by-laws or articles of association; and every person becoming a shareholder by transfer "shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of said shares; *and no change shall be made in the articles of association by which the rights, remedies or security of the existing creditors of the association shall be impaired.*"

In *Richmond* v. *Irons*, 121 U.S. 27, one question in the case was whether Comstock, the record owner of 150 shares at the time of the bank's failure, was liable on them under section 5151. Comstock proved actual sales of 100 of his shares some time prior to the day of failure, and in good faith; but no transfers thereof were made on the bank's books until the very day of failure. The Supreme Court held him liable on the whole 150 shares, saying, at page 58, —

"By Section 5139 of the Revised Statutes, those persons only have the rights and liabilities of stockholders who appear to be such as are registered in the books of the association, the stock being transferable only in that way. No person becomes a shareholder, subject to such liabilities and succeeding to

such rights, except by such transfer; until such transfer the prior holder is the stockholder for all the purposes of the law."

In *National Bank* v. *Case*, 99 U.S. 628, the Supreme Court, in holding liable under section 5151 a pledgee of national bank stock who had caused the same to be transferred to it on the bank's books, said, at page 631, —

"It is thoroughly established that one to whom stock has been transferred in pledge or as collateral security for money loaned, and who appears on the books of the corporation as the owner of the stock, is liable as a stockholder for the benefit of creditors. We so held in *Pullman* v. *Upton* (96 U.S. 328) and like decisions abound in the English courts and in numerous American cases, to some of which we refer. (Citations.) For this several reasons are given. One is, that he is estopped from denying his liability by voluntarily holding himself out to the public as the owner of the stock, and his denial of ownership is inconsistent with the representations he has made: another is that by taking the legal title he has released the former owner; *and a third is, that after having taken the apparent ownership and thus become entitled to receive dividends, vote at elections, and enjoy all the privileges of ownership, it would be inequitable to allow him to refuse the responsibilities of a stockholder*."

Again, in *Anderson* v. *Philadelphia Warehouse Co.*, 111 U.S. 479, the Supreme Court said, at page 483, —

"It is well settled that one who allows himself to appear on the books of a national bank as an owner of

its stock is liable to creditors as a shareholder, whether he be the absolute owner or a pledgee only. . . ."

Again, in *Matteson* v. *Dent*, 176 U.S. 521, at 530, the Supreme Court said, —

"But the settled doctrine is that, as a general rule, the legal owner of stock of a national banking association — that is the one in whose name stock stands on the books of the association — remains liable for an assessment so long as the stock is allowed to stand in his name on the books, and, consequently, that although the registered owner may have made a transfer to another person, unless it has been accompanied by a transfer on the book of registry of the association, such registered owner remains liable."

The two sections above quoted, namely, 5139 and 5210, read in the light of the decisions which have been made thereunder, effectually establish the general rule that the records of the bank at the time of insolvency determine the question who are, and who are not, shareholders of the association liable to the assessment under section 5151. It has also been determined by numerous decisions that the liability under section 5151 is not in favor of the bank, but of its creditors, and does not arise until the bank becomes insolvent. See, for instance, —

*Wickham* v. *Hull* (Iowa), 71 N.W. Rep. 352, 353.

*Irons* v. *Manufacturers Bank*, 21 Fed. Rep. 197.

*Scott* v. *Deweese*, 181 U.S. 202, 212, 213.

A shareholder, then, who appears on the books of the

bank at the time of suspension as the owner of the shares in question is, with certain exceptions, regarded as liable for the assessment on the shares under section 5151. In *Richmond* v. *Irons*, 121 U.S. 27, this was so as to Comstock, although he had previously parted with his shares in good faith and for value. In numerous other cases the same rule has been applied to the same facts. In other cases, where a man or corporation has taken shares in pledge, but has neglected to have himself described as pledgee on the books of the bank, the liability has been enforced against him. In still other cases, where a shareholder, knowing of approaching insolvency, has made out-and-out transfers on the books of the bank to irresponsible persons for the purpose of escaping liability under section 5151, the Supreme Court has ignored the transfer, and pursued the transferrer as the true holder and owner. *And it may be said to be true that, when a national bank suspends, there is always some one on the face of the earth who is liable for the assessment in respect of every share of its outstanding stock, provided you can lay your finger on the proper person before the statute of limitations bars recovery.* In cases where a pledgee has been relieved from liability because he was so described in the transfer, the pledgor would undoubtedly be liable. And in cases where a transferrer, appearing on the books as the record owner, has escaped liability, his transferee would undoubtedly be liable. Similarly, when a transferee has escaped liability, his transferrer would be liable. *The creditors of an association are entitled to assume that there is some one liable for each share of its whole apparent outstanding capital stock in case of suspension.*

In the case of *Whitney* v. *Butler*, 118 U.S. 655, the Whitneys escaped liability on the special ground that they

had actually sold the stock at public auction through R. L. Day & Company, and had delivered the certificates, with a blank power of attorney authorizing the proper officer of the bank to complete the transfer on the books, and that the certificate, with such power of attorney, had actually been delivered to the proper officer of the bank for the purpose of transfer. The Supreme Court likened their position to that of one who would take a deed of land to the proper record office to be recorded, saying that the general rule is that the deed is regarded as recorded when delivered to the register, whether actually entered on the books or not. But, in that case, the persons to whom the stock was sold would undoubtedly have been held liable upon the shares in question, if proceeded against in due time. So, also, as to *Earle* v. *Carson*, 188 U.S. 42.

If, however, the defendant's contention here is sustained, then, in respect of the ten shares of stock represented by her certificate, there was no one on the face of the earth answerable for the liability under section 5151, and therefore the fund provided by the National Bank Act for the security of the creditors of this association was not $300,000, as the books showed, and as everybody supposed and had a right to suppose that it was, but was $299,000; while, at the same time, Mrs. Whittemore held certificate representing the missing $1000, which she could at any time have sold and transferred, and given the purchaser a good title thereto as against the bank.

"Shares in the capital stock of associations under the National Banking Law," to quote the language of the Supreme Court of the United States in *Johnston* v. *Laflin*, 103 U.S. 800, p. 803, "are salable and transferable at the will of the owner. They are, in that

respect, like other personal property. The Statute recognizes this transferability, although it authorizes every association to prescribe the manner of their transfer. . . ."

And at page 804:

"The transferability of shares in the national banks is not governed by different rules from those which are ordinarily applied to the transfer of shares in other corporate bodies."

See also Mass. St. 1903, c. 457, sec. 28.
*Clews* v. *Friedman*, 182 Mass. 555.
*Earle* v. *Carson*, 188 U.S. 42, 46.

Such a construction of section 5 of the Act of July 12, 1882, would injure no one on earth except the creditors, for whose especial benefit section 5151 was enacted; and would set at naught the decisions of the Supreme Court of the United States under section 5151, and the whole substructure of reasoning upon which they are based. That reasoning shows that the status of a stockholder of a national bank, when regarded for the purposes of assessment under section 5151, is very often different from his status as a shareholder between himself and the bank before suspension. People have been held liable for assessment when, by their own acts, they had so placed themselves that they could not assert stockholders' rights as against the bank while a going concern. The reason of this is that the records of the bank are, as a rule, the controlling evidence upon which the creditors' rights are founded. And it may be pertinently asked, What does the evidence in this case show that the creditors of this association knew concerning Whittemore's notice of withdrawal or the ap-

pointment of the two appraisers? Is it not true that they had every right, under the National Bank Act and the Supreme Court decisions, to assume that Whittemore was the holder of the ten shares in question, so far as regards section 5151? If this is not true, then the acts of Whittemore along the line of withdrawal under section 5 of the Act of July 12, 1882, though acts without the knowledge of the creditors, effectually operated to deny to them the benefits of section 5151, while they did not put an end to the rights of Whittemore as a stockholder of the bank before suspension.

The true test of this case is that we are not now concerned at all with Whittemore's rights against the bank, or the bank's rights against her, before suspension. The receiver represents the creditors, and he is now enforcing the rights of creditors, who go, and are entitled to go, by the record. And it is submitted that the record in this case must be held conclusive against Whittemore. Otherwise, no adequate force or effect is given to sections 5210, 5139, or 5151, but the stockholder escapes the liabilities pertaining to her situation, and with her certificate in her pocket.

In *Scott* v. *Deweese*, 181 U.S. 202, Deweese was receiver of a failed national bank. Scott held some of its stock. The Comptroller ordered an assessment, and Deweese demanded payment from Scott of his proportionate part, and, payment being refused, brought the action. The defense was that Scott became a stockholder at a time when the bank increased its capital from $100,000 to $250,000; that he paid for 50 shares of the new capital, and received certificates therefor; that the bank's officers led him to believe that the whole $150,000 of new stock had been paid in, though, in fact, only about two thirds of

it was ever paid in; and that therefore, under section 5142 of the Revised Statutes (part of the National Bank Act), the increase was invalid, and the defendant was not lawfully a stockholder.

The Circuit Court ordered judgment for the receiver on his motion. The Circuit Court of Appeals affirmed that judgment (89 Fed. Rep. 843–856), and Scott then took the case to the Supreme Court on writ of error.

Mr. Justice HARLAN, after stating the facts and citing from the pleadings and Revised Statutes, said, at page 209, —

> "The defendant lays great stress on the words in Section 5142 'no increase of capital shall be valid until the whole amount of such increase is paid in' and until the Comptroller shall certify that the amount of the proposed increase 'has been duly paid in as part of the capital of such association.' But does it follow that one who claimed to be a shareholder in respect of an increase of the bank's capital, and who was recognized as such by the bank, particularly if he held a formal certificate stating that he was a shareholder, can escape liability, under Section 5151, by simply proving — after the bank has suspended and has been placed in the hands of a Receiver — that the *whole* amount of the proposed increase was not in fact paid in as required by Section 5142, although the contrary was certified by the Comptroller upon the bank's report to that officer? We think not."

Again, at page 210:

> "*As between the bank and the defendant, the latter, having paid the amount of his subscription for shares in the proposed increase of the capital, was*

*entitled to all the rights of a shareholder, and therefore, as between himself and the creditors of the bank, became a shareholder to the extent of the stock subscribed and paid for by him.*"

Again, at pages 212 and 213:

"It may be — although upon this question we express no opinion — that the defendant, by proper proceedings instituted in good faith and in due time before the suspension of the Bank, could have had his subscription cancelled upon the ground that the whole amount of the proposed increase of capital had not in fact been paid in, although according to the pleadings the contrary was certified by the Comptroller. *But immediately upon the failure of the Bank the rights of creditors attached under Section 5151, and a shareholder who was such when the failure occurred could not escape the individual liability prescribed by that section upon the ground that the Bank has issued to him a certificate of stock before, strictly speaking, it had authority to do so.* . . .

"If this be a sound view, as we think it is, *it follows that one holding stock in a national bank which is so far valid as to entitle him to enjoy, and who is accorded the right to enjoy, the privileges of a shareholder as against the bank, is a shareholder upon whom assessments may be made in conformity with Section 5151.*"

And again:

"The present suit is primarily in the interest of creditors of the Bank. It is based upon a statute de-

signed not only for their protection but to give confidence to all dealing with national banks in respect of their contracts, debts and engagements, as well as to stockholders generally. *If the subscriber became a shareholder in consequence of frauds practised upon him by others, whether they be officers of the Bank or officers of the Government, he must look to them for such redress as the law authorizes, and is estopped, as against creditors,* to deny that he is a shareholder within the meaning of Section 5151, *if at the time the rights of creditors accrued he occupied, and was accorded the rights appertaining to, that position.*"

Again, at page 215, quoting from *Minor* v. *Mechanics Bank*, 1 Peters, 46:

"The stock was lawfully created, the defendant subscribed for the shares in question and paid for them and received his certificate; and nothing was afterwards done by the directors, the Comptroller of the Currency, or the stockholders in meeting assembled, which they had not a perfect right to do. *The defendant became a stockholder; he held the shares in question when the Bank finally went into liquidation; and, of course, became liable under Section 5151 of the Revised Statutes to pay an amount equal to the stock by him so held.*"

In *Lantry* v. *Wallace*, 182 U.S. 536, Wallace was receiver of a failed national bank, and Lantry held 200 shares of its stock. The Comptroller ordered an assessment of 100 per cent, Lantry refused to pay, and the suit was brought to recover the assessment. Lantry alleged in his answer that he was induced to purchase the stock by

false and fraudulent misrepresentation and concealment by the president of the bank as to the bank's financial condition, whereby he was led to believe, and did believe, that it was perfectly solvent, and its stock unimpaired. He purchased and paid $20,000 for the 200 shares about six months before failure, and he alleged that at the time of such purchase the bank was in fact insolvent and its stock utterly worthless.

On demurrer to the answer the Circuit Court gave judgment for the plaintiff, which was affirmed in the Circuit Court of Appeals (97 Fed. Rep. 865), and Lantry took the case to the Supreme Court on writ of error. The Supreme Court affirmed the judgment. (See the Opinion at page 554.)

In the case at bar, whatever may have been the actual cause of the non-appointment of the third appraiser, so soon as that clearly appeared to the defendant, her proper course, if she desired to escape liability under section 5151, was to have brought proper proceedings in due time before the failure of the bank, either to have her stock surrendered and canceled, and the fair value of it paid to her outside the statute, or to have the appraisers compelled to nominate a third, so that the appraisal could be made and the proceedings completed under the statute. Instead of that, she, for nearly two years, acquiesced in the non-appointment of the third man, neglected to take plenary proceedings to terminate her relations with the bank as a shareholder; never surrendered, or offered to surrender, but retained, her certificates and all the rights that went with them; remained all the time the record owner of the shares on the books of the bank; was accorded full and regular dividends thereon; could at any moment have received a sub-

stantial consideration for the shares by selling them; or could have taken the dividends upon them, and enjoyed all the other rights of a shareholder. She is therefore estopped, as against the creditors of the association, from claiming that she is not a shareholder for the sole purpose of escaping from liability under section 5151.

For all these reasons it is submitted that the Superior Court and the Supreme Judicial Court of Massachusetts erred in directing and upholding a verdict for the defendant in error, and otherwise as alleged in the assignments of error of pages 21 and 22 of the record.

Respectfully submitted,

GEO. L. WILSON,

Counsel for Plaintiff in Error.

(21,474)

# Supreme Court of the United States.

**October Term, 1910.**

**No. 133.**

ALBERT S. APSEY, Receiver of the First National Bank of Chelsea,

PLAINTIFF IN ERROR,

v.

ANNA G. WHITTEMORE.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

## Brief of Defendant in Error.

### STATEMENT OF CASE.

This is an action at law by the receiver of the First National Bank of Chelsea to recover an assessment made by the Comptroller of the Currency upon the stockholders of the said bank, under section 5151 of the Revised Statutes of the United States.

The twenty-year period of succession of said bank expired on September 5, 1904, and the articles of association were amended so as to extend said period for twenty years from said date.

The defendant dissented from this amendment to the articles of association, and acting under the provisions of section 5 of the Act of July 12, 1882, and within the time

fixed by said Act, she gave the bank directors due notice of her desire to withdraw from the association, and within the time prescribed by the statute appointed a member of an appraisal committee, under said section 5, and gave due notice of such appointment to the bank (Record, p. 10).

The bank appointed as a member of the appraisal committee one Hinckley, who was, at the time, president of said bank, one of its directors, and a large stockholder therein (Record, p. 10).

These two members of the committee never appointed a third member, and no appraisal of stock was made.

The defendant made all reasonable efforts, in good faith, to have a third member appointed, but without result (Record, bottom of page 10), and employed an attorney, who urged Hinckley to join in making such appointment, and who conducted a correspondence with the attorney for said bank, or said Hinckley, endeavoring to bring about the appointment of a third member of such committee. But such correspondence did not result in the appointment of a third member of said committee (Record, pp. 10, 11).

On January 1, 1905, the bank declared a dividend to its shareholders, and sent a check for the dividend to the defendant. The defendant at once returned this check, with a statement that she was not a shareholder, and declined to use or accept the check (Record, p. 11). Other dividends were declared to the shareholders of the bank, but no check was sent the defendant therefor.

On August 16, 1906, the bank closed its doors and suspended business, and on August 25, 1906, the plaintiff was appointed receiver of the bank.

On September 25, 1906, the Comptroller, acting in pursuance of section 5234 of the Revised Statutes of the

United States, ordered an assessment of one hundred dollars ($100) a share, to be paid by the shareholders (Record, pp. 8, 9).

This assessment was for the purpose of enforcing the shareholders' liability, provided for by section 5151 of the Revised Statutes of the United States.

The case was tried before a jury in the Superior Court of Suffolk county, Massachusetts, on the 14th day of January, 1908, and, after a full hearing, was submitted to a jury sworn to try the same, and the jury, by order of the Court, returned a verdict for the defendant.

Thereupon the judge of the Superior Court of Massachusetts, before whom the case was tried, reported the said case to the Supreme Judicial Court for the commonwealth, for consideration by said Court of the law in the case. The report of the presiding judge of the said Superior Court appears on pages 8 to 12, both inclusive, of the record.

The case was argued before the Supreme Judicial Court of the commonwealth of Massachusetts, and on May 21, 1908, the said Supreme Judicial Court rendered a decision ordering the verdict of the said Superior Court to stand. The rescript of the said Supreme Judicial Court and its reasons for its decision appear on page 13 of the record and the opinion appears on pages 16 to 20 of the record.

Thereupon it was considered and ordered by the Superior Court for said Suffolk county, Massachusetts, on June 1, 1908, that the defendant, Anna G. Whittemore, recover against said Albert S. Apsey, as he is receiver as aforesaid, her costs of suit, taxed at thirty-nine dollars and eighty cents.

The plaintiff in error brings the case to this Court by a writ of error, assigning nine errors (Record, pp. 21, 22),

alleged to have been made by the said Superior Court of Suffolk county, Massachusetts.

## BRIEF OF THE ARGUMENT.

### I.

The important question to be considered in this case is — Was Anna G. Whittemore a shareholder in the First National Bank of Chelsea on the date of the suspension of the bank, namely, August 16, 1906?

Section 5 of the Act of July 12, 1882, is as follows:—

> "That when any national banking association has amended its articles of association as provided in this act and the Comptroller has granted his certificate of approval, any shareholder not assenting to such amendment may give notice in writing to the directors within thirty days from the date of the certificate of approval, of his desire to withdraw from said association, in which case he shall be entitled to receive from said banking association the value of the shares so held by him, to be ascertained by an appraisal made by the committee of three persons, one to be selected by such shareholder, one by the directors, and the third by the first two; and in case the value so fixed shall not be satisfactory to any such shareholder he may appeal to the Comptroller of the Currency, who shall cause a reappraisal to be made, which shall be final and binding; and if said reappraisal shall exceed the value fixed by said Committee the bank shall pay the expenses of said reappraisal, and otherwise the appellant shall pay said expenses; and the value so ascertained and determined shall be deemed to be a debt due, and be forth-

with paid, to said shareholder from said bank; and the shares so surrendered and appraised shall, after due notice, be sold at public sale, within thirty days after the final appraisal provided in this section."

A. If the defendant complied with the terms of said section 5, she ceased to be a shareholder in said bank on September 5, 1904, when its charter expired.

The record shows (p. 17) that the defendant did not assent to the amended articles, that she seasonably gave a proper notice to the directors, that she appointed her member of the committee of appraisal provided for in the statute, and gave due notice to the bank of this appointment; and that after the bank appointed, as its member of the committee, its own president, who was also a director, and a large shareholder in the bank, the defendant, in good faith, made all reasonable efforts to bring about the appointment of a third member, and engaged an attorney, who endeavored to bring about the appointment of a third member of this committee; but that all these efforts were fruitless, and before a third member was appointed the bank failed.

The statute defines the way in which a dissenting shareholder in a national bank may sever his connection with the bank, and cease to be a shareholder therein, at the expiration of the bank's charter. Every step required by the statute was taken by Anna G. Whittemore, who acted throughout in good faith. Two steps not required of the defendant, but of other persons, namely, the appointment of a third member of the committee, and the appraisal of the shares, were not taken. That cannot, however, operate to make the defendant a shareholder under the extended charter of the bank. The provisions of the statute

as to appraisal of the shares are not for the purpose of compelling the shareholder against his will to become, for a time, a shareholder of the bank under the new charter. They are merely for the purpose of liquidating the amount of his claim against the bank. He ceases to be a shareholder when he gives notice of dissent. He then becomes a creditor of the bank. The subsequent proceedings as to the appraisal cannot affect his status.

To hold otherwise would allow a bank to compel all dissenting shareholders to remain shareholders after the expiration of the time limited by the charter, which was exactly what the statute was designed to prevent.

The trouble here is manifest from the facts. The bank's appointment to this committee was not a fair one. It is clear from all principles of justice and equity that a man who is at one and the same time a director of, a large shareholder in, and the president of a national bank, is not a proper person to appraise the value of stock in his own bank. He is an interested party. That he had reasons for placing obstructions in the way of the appraisal, because he wished to prevent examination of the bank's affairs by an outsider, is a fair inference from the failure of the bank shortly thereafter. This inference was drawn by the Supreme Judicial Court of Massachusetts (Record, p. 18).

It would be inequitable to hold that by improper conduct the representatives of the bank could compel shareholders who did not assent to the extension of the charter, but who desired to withdraw, and who have given notice of their withdrawal, to remain shareholders under the extended charter, and to take the very risk they declined to take.

It has been argued that the defendant should have brought suit to force the two members of the committee to appoint a third member, and to proceed with the ap-

praisal. In the first place, the defendant did employ an attorney, who was endeavoring to induce the appointment of a third member; and while the attorney was so endeavoring the bank failed. Moreover, the defendant, in good faith, made all reasonable efforts to bring about the appointment of a third member of the appraisal committee. A fair inference from this statement in the record is that she had done everything which could be required of her.

B. The certificate of stock is not property, but is merely paper evidence of a right. It stands on the same footing as a deed. The mere surrender or retention of it would not affect the title to the shares any more than the surrender or retention of previous title deeds affects a present title to land. But it was the evidence of her claim as a creditor against the bank, and it would not be reasonable that she should be required to surrender it until she had received payment for her shares, especially in view of the conduct of the bank and its representatives.

II.

The next question arising under the assignments of error is whether said Whittemore can be held liable as a shareholder by estoppel or in any other way.

A. In *National Bank* v. *Case*, 99 U.S. 628, it is stated that a person who is not a stockholder may yet be liable, by estoppel, as a stockholder, to the creditors of a corporation, if he has placed his name upon the books of the corporation as a stockholder, or, in some cases, if he has permitted his name to remain upon its books after he has ceased to be a stockholder. In the case at bar, a neces-

sary element of estoppel is wholly wanting, in that the defendant did not place, or cause to be placed, her name upon the stock ledger of the bank after she had given notice of her desire to withdraw. Its retention was solely the act of the bank and its officers.

*Whitney* v. *Butler*, 118 U.S. 655.
*Earle* v. *Carson*, 188 U.S. 42.

In *Stevens* v. *Follett*, 43 Fed. Rep. 842, and in *Keyzer* v. *Hitz*, 133 U.S. 139, at 149, it was held that, in order that one who is not a shareholder should be liable as a shareholder, he must have done some act ratifying, approving, or acquiescing in the bank's action in having him on the books as a shareholder, or receive some benefit such as would arise from the ownership of such stock. In the case at bar not one of these acts was done by the defendant. Indeed, she went further than merely not ratifying, approving, acquiescing in, or receiving benefits, and when the bank sent her a dividend check, refused to receive it and returned it at once with the express statement that she was not a shareholder in the bank (Record, p. 17).

It is a general principle of law that one who may profit by the gains of an enterprise should bear its losses, and that the statute imposing a liability on shareholders in a national bank rests on this principle.

*Beals* v. *Essex Savings Bank*, 67 Fed. Rep. 816.

The defendant could not have profited by the gains of the bank made at any time since the expiration of its charter, and was at no time since such expiration a shareholder in that bank.

B. The books of the bank are not conclusive as to who are shareholders.

In a number of cases it has been held by this Court that where a transfer of stock has been made in good faith and not collusively, and the certificate has been delivered to the proper bank official, with a power of attorney signed by the transferor of the stock, authorizing the transfer, and the bank officials have neglected to make the transfer, the party in whose name the stock stands on the books has ceased to be a stockholder.

*Earle* v. *Cannon*, 188 U.S. 42.
*Whitney* v. *Butler*, 118 U.S. 655.
*Matteson* v. *Dent*, 176 U.S. 521.

In the case at bar, the defendant had done every act which was required or could reasonably have been expected of her, and it was through the neglect of the bank's officials that she was made to appear as a shareholder. Such neglect or failure of duty on the part of the bank cannot make her a shareholder.

A transfer of bank stock to a person without his knowledge or consent does not make him a shareholder.

*Keyzer* v. *Hitz*, 133 U.S. 139, 149.

So, a transfer fraudulently or collusively made to avoid paying an assessment will be disregarded, and the real owner, not the book owner, held liable.

*Rankin* v. *Fidelity Trust Co.*, 189 U.S. 242, 246.

The real owner of shares is held responsible, although the shares are not registered in his name. The law looks through subterfuges and apparent ownerships and fastens

the liability upon the persons to whom the shares actually belong.

*Ohio Valley National Bank* v. *Hulitt*, 204 U.S. 162, 168.

In the last case cited it is stated that a mistake or error in keeping the official list of shareholders would not prevent the creditors from holding liable all who were in fact the real owners of stock in national banks.

In the case at bar the retention of the defendant's name on the bank's list of shareholders was either a mistake or a neglect of duty, and such retention cannot make the defendant liable as a shareholder.

III.

A. Protection of creditors and public policy.

It may be pertinent, as bearing on the question of public policy, to consider the provisions for the protection of creditors under the Act of July 12, 1882.

But for this amendment to the National Banking Act, all national banks would have gone out of existence at the expiration of twenty years from their establishment. This amendment provides a way for their extension, but it is evident that Congress had no intention of compelling any shareholder to remain such after the twenty-year period of succession had expired. The holders of at least two thirds of the capital stock must consent in writing to the extension, and any shareholder may cease to be such by complying with the provisions of section 5, as did the defendant.

It has been argued that if the defendant is not a shareholder under the extended charter, the creditors are likely to suffer, and that it is the intention of the National Bank-

ing Act that there shall always be somebody to respond for every share of stock in case of the bank's failure. But when the bank enters upon an extension of its existence under this Act of 1882, the act contemplates and provides for a change in its shareholders, and provides a method for shareholders in the old institution to cease to be shareholders, and if there are any dissenting shareholders there must necessarily be a time at which there is no holder of certain shares to respond to an assessment.

The security of creditors, including depositors, is provided for in two ways: First, at least two thirds of the shareholders in the bank must, in writing, consent to the extension, and thereby become shareholders in the extended bank; and second, there must be a special examination of the bank made under the direction of the Comptroller. Unless the bank is found to be in a satisfactory condition the Comptroller does not give his approval to the proposed extension, and the bank must be liquidated as of the date of expiration of its charter, and all shareholders as of that date are, of course, assessable. But when a special examination of the affairs of the bank has been made, and at least two thirds of the shareholders in the bank have consented to the extension, the law contemplates that creditors are sufficiently secured, and allows dissenting shareholders to drop out. The value of their stock is ascertained later and paid them by the bank, and such shares are sold at public auction. But as long as they have complied with the provisions of section 5 of the Act of July 12, 1882, and have not acquiesced in the extension of the charter, they cease to be shareholders simultaneously with the expiration of the bank's charter.

The defendant was not a shareholder in the First National Bank of Chelsea at the time of its suspension, nor

was she at that time estopped to deny that she was a shareholder; and the judgment of the Supreme Judicial Court of Massachusetts was correct.

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